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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 419.

JOHN G. MORRISON, JR., ET AL., APPELLANTS,

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, ET AL., APPELLEES.

APPELLANTS' BRIEF.

Statement.

Appellants filed an original bill (R., 2) and moved for a preliminary restraining order in conformity with the prayers thereof, the motion under the practice in the trial court being equivalent to a rule to show cause. The defendants countered with motions to dismiss (R., 2). The trial judge in a written opinion (R., 3-13) sustained the motions to dismiss with leave to file an amended bill (R., 13, 14). Appellants then filed an amended bill (R., 14-35).

It is alleged in the amended bill that appellant Morrison is a citizen of the United States and a resident of the State of Minnesota; that he is a duly enrolled, allotted, and recognized member "of that class of persons described as 'all the Chippewa Indians in the State of Minnesota' in an agreement or agreements duly entered into with the United States * * *, and therein declared to be the sole owners and beneficiaries of the net funds received, and to be received, from the sale and disposition of the property ceded by said agreements;" "that he sues in his own right as well as for and on behalf of all other persons" of said class "similarly situated" (R., 14). Hubert Work, Secretary of the Interior (R., 39), Charles H. Burke, Commissioner of Indian Affairs (R., 14), William Spry, Commissioner of the General Land Office (R., 14), and Andrew W. Mellon, Secretary of the Treasury (R., 14), are named parties defendant.

The amended bill alleges (R., 14-15; par. 3) that prior to 1889 thirteen different bands of Chippewa Indians occupied ten reservations in the State of Minnesota, eleven of which bands, occupying eight reservations, comprised the tribe known as the Chippewas of the Mississippi and two of which bands—the Fond du Lac and Grand Portage Bands—occupying two reservations, were a part of the Lake Superior Tribe. Efforts had been made to secure treaties or agreements with all the Chippewa Indians occupying reservations in Minnesota for the consolidation of all of said bands or tribes, to allot the Indians land in severalty, and to provide for the disposition of the residue land not needed for allotment purposes, and the distribution of the proceeds to be received therefrom, share and share alike, among all the Indians sought to be consolidated. These efforts proved unsuccessful,

and Congress then adopted a plan designed and intended to effectuate the desired end by enacting the Act approved January 14, 1889 (25 Stat., 642). Said act provided for the appointment of a commission to negotiate with all the different bands or tribes of Indians occupying reservations within the limits of the State of Minnesota, for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations in said State, except so much of the White Earth and Red Lake Reservations as would be required to make allotments to the Indians and which were to be reserved exclusively for that purpose. The cessions of the ceded lands were to be deemed complete if assented to by two-thirds of the male adults over 18 years of age belonging to the band or tribe of Indians occupying each reservation, *except the Red Lake Reservation. The cession of the Red Lake Reservation* required the assent of two-thirds of the male adults over 18 years of age of *all the Chippewa Indians of Minnesota. For the purpose* of ascertaining whether the Indians assented to the cessions, and for the purpose *of making the allotments and money payments* provided for in the act, the commission was directed to make an accurate census of each tribe or band. The acceptance and approval of the cessions by the President of the United States was declared by the act to be "deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever *for the purposes and upon the terms in this act provided.*"

The act then provided for allotments to the Indians and contained complete and detailed instructions with perfect limitations for the classification, appraisal, and disposition of

every acre of the ceded lands, and of every dollar of the funds to be received therefrom, the provisions of the act with reference thereto being set out with particularity in the bill (R., 16, 17). The commission was appointed, a complete census of all the Indians made; land was reserved on the White Earth and Red Lake reservations exclusively for the purpose of making the allotments, agreements were entered into with, and executed by the requisite number of Indians for the cession of all their lands not needed for allotment purposes to be disposed of upon the express conditions enumerated in the Act of 1889. These agreements were duly approved by the President of the United States on March 4, 1890, and, in the language of the act, "took effect" (R., 18).

It is then alleged (R., 18; bill, par. 5) that by said agreements there was an immediate and complete cession of all the right, title, and interests of all the different bands or tribes of Indians and of the United States in and to said ceded property, which was to be disposed of upon the express conditions enumerated in the agreements for the exclusive use and benefit of said designated class. It is alleged that thereafter the United States had no interest in the ceded lands other than to see to it that they were disposed of in conformity with the terms of the cessions, and that the United States has no power to dispose of any of said lands other than as provided in said agreements, to the loss and injury of said designated class.

The bill then alleges (R., 18-32); bill, pars. 6-14) absolute want of power in the defendants to do certain acts it is alleged they are about to commit and their refusal to perform certain plain ministerial duties requiring no exercise of discretion, which they are commanded by law to perform, which have and are resulting in great and irreparable loss to

appellants. The bill further charges the defendants with threatened acts under color of unconstitutional enactments, which it is alleged will result in irreparable loss and injury to appellants, and, lastly, that appellants have no plain, complete, and adequate remedy at law.

The bill concludes (R., 32-35) with appropriate prayers for injunctive relief.

Defendants did not answer, but filed motions to dismiss (R., 2, 36), said motions being identical and being based upon the following grounds:

> "1. That there is defect of parties complainant.
>
> "2. That there is defect of parties defendant in that the State of Minnesota is an indispensable party to so much of the suit as involves swamp and overflowed lands.
>
> "3. That the suit is essentially an action against the United States, an indispensable party hereto, which has not consented to be sued in this behalf.
>
> "4. That the bill does not set out any facts sufficient to entitle the complainant to the relief prayed for or to any relief.
>
> "5. That the Court is without jurisdiction over the subject-matter of the suit."

Upon hearing, the Court sustained the motions and a decree was entered dismissing the bill (R., 36), from which decree an appeal was prosecuted to the Court of Appeals of the District of Columbia. That court in a written opinion (R., 39-43) affirmed the decree of the Supreme Court of the District of Columbia (R., 44). From that decree an appeal was prosecuted to this Court, nineteen separate grounds of error being alleged (R., 45-48), which will hereinafter be considered in their appropriate order.

ARGUMENT.

1. The Nature of the Title to the Property in Suit and the Rights of Appellants Therein.

The primary questions to be determined are (1) the nature of the title to the property in suit and (2) the interest of appellants therein. The determination of these questions will dispose of the five grounds assigned as the basis for the motions to dismiss the bill (R., 2) sustained by the trial court (R., 13), affirmed by the Court of Appeals (R., 39-43), and which rulings are here assigned as error (R., 45-6, assignments 1 to 7, inc.).

On Jaunary 14, 1889, and for a long time prior thereto, two bands of the Lake Superior Tribe of Chippewa Indians occupied two separate reservations in the State of Minnesota, acquired for valuable consideration and set apart for the exclusive use of the members of said bands. Eight reservations in the State of Minnesota, occupied by eleven separate bands of Chippewas of the Mississippi Tribe had been acquired by that tribe for valuable consideration and set aside for the exclusive use and benefit of the members of said eleven bands. The bands of the Chippewas of the Lake Superior Tribe were separate and distinct from the Chippewas of the Mississippi Tribe. The United States had, prior to 1889, made unsuccessful efforts to secure agreements with all the bands and tribes for a consolidation of all their property holdings situated in the State of Minnesota, to dissolve all the band and tribal organizations, and to merge their members into one class, described as "all the Chippewa In-

dians in the State of Minnesota," and to equally distribute all the property, share and share alike, among the individual members of said class (R., 14, 15; bill, par. 3, H. R. Report No. 789, 50th Cong., 1st Ses., pp. 5, 6).

To effectuate this plan, all efforts theretofore made having proved futile, the Act of January 14, 1889 (25 Stats., 642), was enacted. This act (sec. 1, R., 15) authorized commissioners to be appointed thereunder

> "to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the commissioners for said purposes, *for the purposes and upon the terms hereinafter stated.*"

The cession and relinquishment of all band and tribal title to each of the different reservations, except the Red Lake Reservation, was to be deemed sufficient if made and assented to in writing by two-thirds of the male adults over 18 years of age of the band or tribe of Indians occupying and belonging to such reservation; *as to the Red Lake Reservation the cession and relinquishment was to be deemed sufficient if made and assented to in writing by two-thirds of the male adults over* 18 *years of age of all the Chippewa Indians in Minnesota.* This latter provision was deemed necessary, as Congress recognized, and so declared, that all the Chippewas

Indians in Minnesota had an equal interest in the Red Lake Reservation (H. Rept. No. 789, 50th Cong., 1st Ses., pp. 2, 6).

For the purpose of ascertaining whether the proper number of Indians yielded and gave their assent to the cession as aforsaid, and for the purpose of making the allotments and payments provided for in said act, the Commissioners were directed to make an accurate census of each tribe or band (R., 15). The census was made and separate agreements were regularly entered into with each of the separate bands and accepted and approved by the President of the United States on March 4, 1890, all in strict conformity with the provisions of said act (R., 17, 18; bill, p. 4). The agreements recited that the members of each band, acting for the band,

> "consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish and convey to the United States all our right, title, and interest in and to" (description of land) *"in accordance with the provisions of said act;* * * * and we do also hereby cede and relinquish to the United States all our right, title, and interest in and to so much of the Red Lake Reservation as is not required and reserved under the provisions of said act, *to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided."* (H. R. Ex. Doc. 247, 51st Cong., 1st Sess., pp. 28, 67.)

The Act of January 14, 1889, embodied in the agreements, provided for the reservation of lands on the White Earth

and Red Lake reservations *only* for allotment purposes, and then expressly directed that allotments to the Indians should be made as soon as practicable after the census was taken and the cession and relinquishment obtained, approved and ratified, as specified in section 1. The allotments were to be made under the provisions of the Act of February 8, 1887 (24 Stats., 366), commonly known as the General Allotment Act, which act (Sec. 2) clothed the Secretary of the Interior with full authority to arbitrarily allot land to any Indian who failed to take his or her allotment within four years (R., 16).

As to the ceded lands the agreements contained express and detailed instructions with perfect limitations for their survey and classification either as "pine lands" or "agricultural lands" and for their sale and disposition as well as the timber thereon and the deposit of the net proceeds received therefrom in the Treasury of the United States to the credit of *"all the Chippewa Indians in the State of Minnesota"* as a permanent fund, which should bear interest at the rate of 5 per centum per annum, payable annually for the period of fifty years, *after the allotments provided for had been made.* The interest and permanent fund was to be disbursed as follows: three-fourths of the interest annually accruing was to be paid to the Indians in cash and one-fourth was to be, under the direction of the Secretary of the Interior, "devoted *exclusively* to the establishment and maintenance of a system of free schools among said Indians in their midst and for their benefit," and at the expiration of the fifty-year period the permanent fund was to be divided and paid to all of *"said Chippewa Indians and their issue then living"* in cash in equal shares (R., 16, 17).

It is undoubtedly true that in 1889, when tribal relations existed, Congress, in the exercise of its plenary power over Indian tribal property, which power has always been deemed political, could have disposed of the entire estate in such manner and upon such terms as it deemed wise and proper. But, as pointed out in Minnesota *v.* Hitchcock, 185 U. S., 373, at 394, it also possessed the power to deal with the Indians by treaty or agreement, and, having done so and the tribal organizations having ceded all their tribal property upon specific terms and the cessions having become complete, as stated in U. S. *v.* Mille Lac Band, 229 U. S., 498, at 508, "the Indians, no less than the United States, are bound by the plain import of the language of the Act and the agreement." By the presidential acceptance and approval on March 4, 1890, the agreements *"took effect"* as declared by the statute—that is, there was a complete transfer of title to the property, which thereafter was impressed with all the conditions enumerated in the agreements, and there then remained only the ministerial duty of executing the agreements according to their plain tenor. The plenary political power of Congress theretofore existing over the theretofore tribal property was extinguished, there thereafter remaining no tribal property or tribal relations.

There was an immediate grant of all right, title, and interest of the bands or tribes—the then owners of the possessory right and equitable title—to which was added all the right, title, and interest of the United States—the sovereign and *owner* of the legal title (Mann *v.* Wilson, 23 How., 457, at 464). The United States thereby became the mere *holder* or custodian of the legal title as naked trustee for the

purpose of administering through its officers named in the agreements the trust "for the purposes and upon the terms" stated. The bands or tribes were dissolved and all vestige of band or tribal title was extinguished (R., 16). The agreements constituted deeds of settlement whereby the bands, tribes, and the United States made complete settlement of all their separate right, title, and interest in and to the property for the exclusive use and benefit of a designated class of people described in the agreements as "all the Chippewa Indians in the State of Minnesota." The individual members of this class had theretofore been definitely ascertained, identified, and enumerated on the *"census rolls"* previously made. There was an immediate and complete vesting of property interests in the individual members of the class. Every person enumerated on the census roll (R., 15; agreements, par. 1) was invested with a complete right to an allotment of land, the right remaining afloat until exercised, and a vested life interest in a share of all money payments made during his or her life (agreements, par. 7, R., 16, 17), as was likewise his or her children.

The rights conferred were property, not personal rights, and come within all the definitions of vested property rights. In Pearsall *v.* Gr. N. R. Co., 161 U. S., 648, at 673, this Court said:

> "A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate fixed right of present or future enjoyment,' and by Chancellor Kent as an 'immediate right of present enjoyment or a present fixed right of future enjoyment.' 4 Kent Com., 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being

> expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Cooley, Const. L., 332."

The agreements (R., 15, 16, 17) contained detailed instructions, with perfect limitations, to the defendant administrative officers with reference to the disposition of every acre of land and of every dollar of the net proceeds to be received. It remained only for the defendant administrative officers to carry into execution their plain terms. The trust thus created was complete in itself—an executed trust. Neves *et al. v.* Scott *et al.*, 9 Howard (U. S.), 196, at 211.

2. The Rights of Appellants in and to the Property are Protected by the Constitution.

Individual rights in and to Indian property secured by treaties or agreements that are protected by the Constitution from encroachment or impairment either by acts of, (1) *executive officers*, or (2), *legislation by Congress*, have frequently been the subject of careful consideration by this Court. All of the threatened acts, to prevent which injunctive relief is sought, fall within either of said classes. The paragraphs of the bill will be considered under these two classifications:

(a) Threatened Acts of Appellees for Which There is no Authority of Law.

That the trial court had power to afford appellants relief against the threatened acts of appellees for which there is no authority of law, and which would, if committed, result in irreparable loss to appellants, has been repeatedly declared by this Court.

Garfield *v.* United States *ex rel.* Goldsby, 211 U. S., 249.

Ballinger *v.* United States *ex rel.* Frost, 216 U. S., 240.

Philadelphia *v.* Stimson, 223 U. S., 605, at 618, 619.

Lane *v.* Santa Rosa, 249 U. S., 110.

Noble *v.* Union River Logging R. Co., 147 U. S., 165.

When there is no power in the administrative officers to commit the threatened acts the suit is not one against the United States. Philadelphia *v.* Stimson, 223 U. S., 605, at 618, 619.

We will now consider the separate paragrapphs of the bill charging threatened acts falling within this class and the errors alleged to have been committed by the Court below.

Sixth Paragraph (R., 18, 19).—This paragraph has been eliminated by a change in the policy of the Secretary of the Interior, evidenced by the filing of an original suit in this Court (Original, No. 22), now pending for the cancellation of the patents issued, as well as the applications pending.

Seventh Paragraph.—It is alleged in the bill (R., 19, 20), that under the agreements patents covering the lands

classified as "agricultural lands" were to be issued "only upon the payment of the full purchase price of $1.25 per acre" by the entryman, the money to be paid in five equal annual payments (R., 16) and to be placed in the trust fund, which was to bear interest at the rate of 5 per cent per annum, three-fourths of which was to be distributed annually among the members of said designated class in being, and the remaining one-fourth was to be used annually to provide schools for the Indian children. By the Act of May 17, 1900 (31 Stats., 179), known as the Free Homestead Act, it was provided that:

> "All settlers under the homestead laws of the United States upon the agricultural *public lands*, which have *already been opened* to settlement, *acquired* prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry."

The act further provided that all sums of money so released which if not released would belong to any Indian tribe should be paid to such Indian tribe by the United States from the moneys received from the annual sales of public lands, and should the moneys so received be insufficient for the support of the agricultural colleges and stations then being supported out of said proceeds the deficiency should

be made up by the United States. Appellants allege that the lands ceded under the agreements were not *"public lands"* within the meaning of the Act of May 17, 1900, nor have they since become public lands, and that the Act of May 17, 1900, had no application to the disposition of any of the ceded lands. It is then alleged that appellee, Commissioner of the General Land Office, acting outside of the scope of his lawful authority, but under the color of his office, has, since May 17, 1900, mistakenly issued patents to several thousand homestead entrymen upon the erroneous assumption that the said Act of May 17, 1900, applied to the ceded lands, thereby conveying to them the lands embraced in their entries without the payment being made for said lands as required by the agreements as a condition precedent to the issuance of any patent, and that no moneys have been deposited in the trust fund standing to the credit of the designated class for the lands so patented. It is further alleged that the loss in interest alone which appellants have sustained amounts to substantially as much as the principal, and that appellee, the Commissioner of the General Land Office, is about to issue patents to several thousand additional homestead entrymen conveying title to the trust lands embraced in their entries, under the provisions of the said Act of May 17, 1900, without the payment of a dollar therefor into the trust fund, to the irreparable loss of the Indians, and that he will do so unless enjoined by order of the Court.

While it is not squarely alleged in the bill, it is a fact shown by the laws of Congress, to which the attention of the Court is invited, that not an acre of the lands ceded under the agreements of 1889 had been opened to settle-

ment under the homestead laws on May 17, 1900. By the Act approved June 27, 1902 (32 Stats., at p. 404, Sec. 5), the work of making the allotments to the Indians who elected to select their allotments out of the ceded lands was transferred from the commission to the Secretary of the Interior, and the act expressly provided that the allotments should be completed before the land classified as "agricultural land" was opened to settlement, section 5 of said Act providing as follows:

> "SEC. 5. That the Secretary of the Interior shall proceed as speedily as practicable to complete the allotments to the Indians, which allotments shall be completed before opening the agricultural land to settlement."

Thus it affirmatively appears that not an acre of the lands ceded under the agreements of 1889 had been, or was, "open to settlement" on May 17, 1900, and that the Free Homestead Act could not have had any application to the ceded lands.

The Court below (R., 40, 41) held that the ceded lands

> "are *public lands* within the meaning of the Act of 1900. The legal title to them is in the United States, and it has a right to dispose of them. By their disposition in the way provided for in the last-mentioned act the trust fund of the Indians does not suffer, for the act declares that the United States shall pay into the fund a sum of money equivalent to that which it would have received if the land had been sold at the price stated in the Act of 1889. Thus the Government becomes responsible for the price of the land as it is responsible for the trust fund."

This ruling is assigned as error (R., 46, tenth assignment). Aside from the fact that on May 17, 1900, not an acre of the ceded lands had been "opened to settlement," as early as May, 1902, this Court, in Minnesota *v.* Hitchcock (185 U. S., 373, at 391, 392) expressly held that the ceded lands were not "public lands," and at page 394 said:

> "The cession was not to the United States absolutely, but in trust."

The Act of May 17, 1900, in express words limited its application to *"public lands" "acquired"* by the United States. The word "acquire" as used in the Act of May 17, 1900, means "to make property one's own. It is regularly applied to a permanent acquisition" (Bouvier's Law Dict., vol. I, p. 78.) The ceded lands had not become the permanent property of the United States, but the United States merely held the legal title as naked trustee for a specific purpose. The Act of May 17, 1900, provides—

> "That all sums of money so released" (meaning the release of the entrymen from the payment of the purchase price of $1.25 per acre), "which, if not released, would belong to any Indian tribe, shall be paid to such Indian tribe by the United States, * * *."

The obligation thus assumed by the United States related, first, to only lands falling within the provisions of the Act of May 17, 1900, and, second, to the payment of merely the purchase price of $1.25 per acre for such lands. It contains no provision directly nor indirectly obligating the United States to pay for lands not embraced within its pro-

visions and contains no provision for the payment of any interest on deferred payments on land patented thereunder. As alleged in the bill, not a dollar has been paid into the trust fund for any of the lands patented during the past 22 years, the interest on which payments, if they had been made before the issuance of the patents as required by the agreements, would amount to substantially as much as the principal. This interest appellants were annually entitled to have received during the past 24 years. Thus, on the face of the record, it is apparent that appellants have already sustained heavy loss, and if the remaining lands are patented there will arise a question as to the liability of the United States for the unauthorized acts of its officers, and if its liability should be established there is no assurance that appellants will be paid within the near or distant future even the purchase price of $1.25 per acre, and there is no obligation on the part of the United States under the Act of 1900 to pay any interest. The great loss which appellants have sustained by the unauthorized acts of appellee Spry and his predecessors in office is apparent, and unless the injunctive relief asked is granted further great and irreparable loss will be sustained.

The construction of the Act of 1900 contended for by appellants conserves and protects the rights of appellants in and to the income to be received from the unpatented lands which they are entitled to annually receive. The construction given that act by the courts below permits the patenting of the remaining lands without the payment of a dollar of the purchase price either when patent issues or at any fixed time in the future, which necessarily will result in great and irreparable loss to the appellants, particularly in

interest. Twenty-four years have elapsed since the Act of 1900 became operative and not a dollar has been paid into the trust fund for the lands heretofore patented. As held by this Court in Minnesota *v.* Hitchcock, 185 U. S., 373, at 402:

> "In construing provisions designed for their education and civilization as fully, if not more than in construing provisions for their material wants, is it a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress."

PARAGRAPH 10-A (R., 22-24).—It is alleged in this paragraph that the Commissioners appointed under the Act of January 14, 1889, were authorized to reserve only sufficient land on the Red Lake Reservation to allot the 1,168 Indians entitled to allotments thereon of 80 acres each; that because a part of the land on the Red Lake Reservation was swampy and untillable, the Commissioners reserved approximately 700,000 acres, stating in their report, which is quoted in the bill, that the area reserved was much larger than would be required to make the allotments to the Red Lake Indians, but that it could not be reduced until after the surveys and allotments had been made. It is further alleged that by Section 3 of the Act of 1889, as embodied in the agreements, the Commissioners were directed to allot lands to all the Indians on the Red Lake Reservation, under the provisions of the Act of February 8, 1887 (34 Stat., 388), "as soon as practicable after the census had been taken and the cession and relinquishment obtained"; that the Commission failed, neglected, or refused to make any allotments to the Indians

on this reservation, and that in 1901 the Commission was discontinued. By the Act approved June 27, 1902 (32 Stat., 400, Sec. 5), the work of completing the allotments was transferred to the Secretary of the Interior, who was directed to complete the allotments to the Red Lake Indians as speedily as possible, and that said act expressly provided that said allotments should be completed before any of the ceded lands were opened to entry under the homestead laws. It is then alleged that by Section 2 of the Act of February 8, 1887, under which the allotments were to be made, the Secretary was given authority to arbitrarily allot land in the name of any Indian who failed to take his or her allotment within four years after the census was made, and the cessions became complete; that the cessions became final on March 4, 1890, at which time the census was complete; that the agricultural lands were opened to entry in 1908, but that appellee Work and his predecessors in office, in disregard to positive law, have arbitrarily refused, and that appellee Work still refuses, in definance of positive law, to permit a single Indian on the Red Lake Reservation to take or receive his or her allotment; that many of those who were entitled to allotments have since died, and their rights have become extinct; that the reservation has for 33 years been arbitrarily held as a closed reservation, excluding all forms of public improvement, denying to the Indian children public-school facilities, and denying to all members of the Red Lake Band any opportunity for advancement; that said arbitrary refusal to permit the members of the Red Lake Band to take their allotments has prevented the fifty-year trust period from commencing to run, the agreements ex-

pressly providing that it should commence to run "after the allotments provided for in this act have been made;" that said arbitrary and capricious refusal to permit the Indians to take their allotments has prevented the disposition of the excess lands and the deposit of the proceeds to be received therefrom in the trust fund, thereby depriving appellants of the use of the interest that would have annually accrued thereon, and that the continued persistent refusal of appellees Burke and Work to permit said Indians to take their allotments will result in further deferring the commencement of the running of the fifty-year trust period and in depriving appellants of the income from the proceeds to be received from the sale of the excess lands to which they are lawfully entitled, to their great and irreparable loss and injury; that said arbitrary refusal of appellees Burke and Work has resulted in a continuance of an agency on the reserved lands, the expense of maintaining which is being illegally paid out of the trust fund belonging to all the Chippewa Indians in the State of Minnesota, amounting annually to approximately $50,000, and has resulted in the unnecessary and illegal expenditure of more than $2,500,000 of the trust fund belonging to all of said designated class in the care and support of said Indians who have been illegally denied their allotments, and who would have, had they been allotted as they were entitled to, been self-sustaining, and that this condition will continue, to the great and irreparable loss of appellants. The relief asked (R., 33, prayer *f*) is for a mandatory injunction requiring appellees Burke and Work to permit the members of said designated class entitled to allotments out of the reserved

lands to select and receive their allotments as provided in said agreements.

This paragraph of the bill charges appellees Burke and Work with refusing to obey positive law and with absolute want of power to deny allotments to the Indians, which unauthorized acts are resulting in great and irreparable loss to the entire designated class. The Court of Appeals (R., 42) held that "Morrison is not a member of the Red Lake Band, and has shown no authority to speak for them." The Court then says:

> "At the bar it was stated by counsel for defendants and not denied by his opponent that the Red Lake Band did not desire the relief which Morrison sought for them, and that they were at that time represented in court, though not on record, by an attorney, for the purpose of assisting defendants in the position which they were defending."

This is assigned as error (R., 46, assignments 9 and 12). It was impossible within the one hour allotted for argument in the Court of Appeals for counsel for appellants to have categorically denied all of the statements mistakenly made outside of the record by counsel for appellees. If there was any basis for said statement it should have been made by answer. For the information of the Court it may be stated as a fact that the members of the former Red Lake Band not only desire their allotments at this time, but have been endeavoring to obtain same for twenty years, as will conclusively appear from the many applications on file in the Indian Bureau, and that they have been prevented from obtaining them solely by the unauthorized acts of appellees

Burke and Work and their predecessors in office. The bill alleges that Morrison, as well as all the members of the former Red Lake Band, are members of the designated class for whose exclusive benefit the grants were made. That is not denied. Morrison is here insisting that appellees permit the members of the former Red Lake Band to take their allotments (R., 33, prayer *f*), as appellees are commanded to do by law and which appellees have no lawful right to refuse. Appellees' refusal has for thirty-four years, and is now, working irreparable loss to the entire class, which is prejudicial to, if not destructive of, the rights of Morrison as well as all other living members of said class. Morrison is asking nothing prejudicial to the interests of the members of the former Red Lake Band. He is here asking merely the performance by appellees of a ministerial duty for the benefit of the entire class. The enjoyment of his property rights, as well as the enjoyment by all the members of said designated class of their property rights, is dependent upon the performance of a ministerial duty by appellees Burke and Work and their refusal to perform said ministerial duty is resulting in the destruction of the property rights of the entire class. Appellants, therefore, assert their unqualified right, under the authorities hereinbefore cited under this heading, to the aid of a court of equity in requiring appellees Burke and Work to perform said ministerial duty.

PARAGRAPH 11-*a* (R., 26, 27, 28).—It is alleged in paragraph 11-*a* that under the agreements one-fourth of the interest annually accruing on the principal trust fund was, during the period of fifty years, to be devoted "exclusively to the establishment and maintenance of a system of free

schools among said Indians in their midst and for their benefit;" that one-fourth of the interest now annually accruing amounts to about $60,000; that there are more than 4,000 Chippewa Indian children of school age, and if the fund was equally divided each child would receive about $15.00 per annum for educational purposes; that all the members of said designated class are citizens of the United States and of the State of Minnesota, except the Indians on the Red Lake Reservation, numbering more than 1,500, who have never been allotted and who have thereby been deprived of citizenship; that of the more than 4,000 Indian children of school age, approximately 3,200 reside in established public school districts of the State, having ample school facilities to care for them; that the State of Minnesota maintains a splendid public school system, and by its laws all parents of Indian children are required, under heavy penalty, to see to it that their children of school age are in regular school attendance during the school term; that appellee Burke, with the approval of appellee Work, has entered into contracts with the authorities of two sectarian mission schools for the support and education of approximately 220 Indian children at a cost of approximately $25,000, which is being paid out of said one-fourth of the interest money; that approximately 80 per cent of said children so placed in the sectarian schools have been taken from the public school districts, many of them residing in towns with school-houses located close to the homes of heir parents; that said sectarian schools form no part of "a system of free schools" under the direction of the Secretary of the Interior, as provided in said agreements; that the Secretary of the Interior has no jurisdiction or control

over said sectarian schools, which are operated, controlled, and maintained by an organization separate and distinct from the Department of the Interior; that the expenditure of said school funds for the maintenance and education of said children in said sectarian schools is without any authority of law, and that the remaining approximately $35,000 is inadequate to provide suitable, and in many cases any, school facilities for those children who are without public school facilities, and deprives all the Indian children who are not embraced within the favored and illegal class entered in said sectarian schools of any part of the school fund; that appellee Burke will, unless restrained by order of the Court, continue to regularly pay the amounts provided for in said contracts to said sectarian schools out of the school funds belonging to appellants, and that he will, unless restrained by order of the Court, enter into similar illegal contracts with said sectarian schools at the commencing of the next school year, and that appellee Work will, unless restrained by order of the Court, approve said illegal contracts to be so entered into, to the great and irreparable loss and injury of appellants.

The allegations of this paragraph of the bill stand admitted. There is and can be no claimed authority for the acts and threatened acts of appellees. The Court of Appeals (R., 42) ruled that as the representatives of the sectarian schools had not been made parties defendant and were not before the Court, no relief could be granted; and, further, that "the Act of 1889 specifically enjoined upon the Secretary of the Interior the duty of spending a certain part of the interest derived from the fund for the establishment

and maintenance of a system of free schools for the children." This ruling is assigned as error (R., 47, assignment 15). The bill alleged absolute want of power in the appellees to enter into the contracts, or to expend the money thereunder, and the sectarian schools were not necessary parties. Cherokee Nation v. Hitchcock, 187 U. S., 294, at 300. The provision contained in Section 7 of the Act of 1889, which Act was embodied in and made a part of the agreements, authorizing appellee Work to expend the money, provides:

> "• • • and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, *be devoted exclusively to the establishment and maintenance of a system of free schools among said* Indians, in their midst and for their benefit; • • •."

The expenditure of the money is expressly limited to "the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit." The undoubted object and purpose of this provision was to enable the Secretary to establish a free school system, similar to the public school system of the States, for the common benefit of all the Indian children, to be operated under his control. No authority is contained therein for the establishment of "boarding schools," which constitute a separate and distinct class of schools and which could only at best provide accommodations for a comparatively few children, and no authority is therein contained to use the money in placing Indian children in sectarian schools neither established nor maintained under the supervision of the Secre-

tary nor over which he has any authority. The bill alleges (R., 27)—

> "that said mission boarding schools form no part of a system of free schools under the direction of the Secretary of the Interior as authorized by said agreements; that the Secretary of the Interior has no jurisdiction or control over said mission boarding schools which are operated, controlled and maintained by an organization separate and distinct from the Department of the Interior."

There being no power in the Commissioner of Indian Affairs to enter into such contracts and no power in the Secretary of the Interior to approve them, their execution by appellees Burke and Work was clearly the mere acts of individuals and not the acts of officers of the United States.

(*b*) Threatened Acts of Appellees under Color of Acts of Congress Claimed by Appellants to be Unconstitutional.

The attention of the Court is again invited to the fact that we are dealing with property secured, under executed agreements, to those persons enumerated on the census rolls and their issue. There is no tribal organization nor tribal property. Individual rights in and to the funds to be received from the sale of the ceded lands have vested. The United States is the mere custodian of the legal title for the sole purpose of administering the trust according to its tenor. Such rights are protected by the Constitution against impairment or destruction by acts of Congress.

Jones *v.* Meeham, 175 U. S., 1.
Choate *v.* Trapp, 224 U. S., 665.

Want of power in Congress to have validly enacted the legislation assailed, and threatened acts of appellees under authority not validly conferred, is the basis for the relief asked under this heading. It is not a suit against the United States, but one merely to prevent the commission of unauthorized acts. Philadelphia Co. *v.* Stimson (223 U. S., 606, at 620). The legislation assailed is not regulatory, but confiscatory, of the property rights of appellants.

The Court of Appeals (R., 43) held that the Act of 1889 did not constitute a contract; that appellants acquired no vested rights in the execution of the trust, and that Congress "as the guardian of the *tribal* Indians, may change its methods of handling their funds whenever in its judgment the welfare of the Indians requires that it be done." Herein is found the principal error claimed by appellants to have been committed by the courts below and which ruling is assigned as error (R., 45-46; Assignments 1, 2, 3, and 8). The courts below proceeded upon the theory, which counsel for appellants insists was erroneous, that the *property* in suit is *tribal* property and not *individual*.

The Court of Appeals failed to differentiate between the rights of appellants *before* and *after* the *settlement* made under the authority of the Act of 1889. *Prior* to said settlement Congress could have undoubtedly repealed or modified the Act of 1889, but *after* the settlement was made and the act carried into execution by the cessions and individual rights attached Congress had no power to destroy or impair those rights by making other and different disposition of the ceded property, to the loss and injury of the *cestuis que trustent*. The Court of Appeals treated the property as *tribal* property, over which Congress had full plenary control,

and based its decision upon the ruling of this Court in Gritts *v.* Fisher, 224 U. S., 648, and cases therein cited, all of which dealt exclusively with *tribal* property. In the Gritts case (p. 648) this Court held that the Act of Congress therein under consideration "was but an exercise of the administrative control of the Government over the *tribal* property of *tribal* Indians, and was subject to change by Congress at any time *before it was carried into effect* and *while the tribal relations continued.*" In the case at bar the Act of 1889 had been *carried into effect* by the cessions and grants made thereunder, and there remained no tribal *property* nor *tribal* relations.

We will now consider the separate paragraphs of the bill in which it is alleged that the acts of Congress are confiscatory of the rights of appellants and are unconstitutional and the errors claimed to have been committed by the courts below:

PARAGRAPH EIGHT (R., 20-21).—It is alleged in the eighth paragraph of the bill that by sections 4 and 5 of the agreements the lands classified as "pine lands," together with the standing timber thereon, were to be appraised and sold at public auction, at the highest price obtainable, but in no event at less than their appraised value. Because of the frauds perpetrated in the disposition of part of the timber lands, after the agreements of 1889 took effect, Congress, by the Act of June 27, 1902 (32 Stats., 400), for the protection of appellants against further repetition of said frauds, changed the method of disposing of the timber, so that, instead of being sold standing, it was cut into logs and sold on bank scale. The said Act of 1902 also provided that when the timber was removed from the "pine lands" the

land should then be "classified and treated as agricultural lands, and should be opened to homestead entry." Following the Act of 1902 came the Act of May 23, 1908 (35 Stats., at 272, Sec. 4), which contained a similar provision to that contained in the Act of 1902, and which latter act further provided that none of the land should be disposed of except upon the payment of $1.25 per acre. It is alleged that these lands, after the timber has been removed, are reasonably worth in the open market from $5 to $250 per acre; that much of the lands face the lake fronts and are very valuable; that the provisions of the Acts of 1902 and 1908 directing the disposition of these lands under the homestead laws at $1.25 per acre instead of at their market value as provided in the agreements, are confiscatory of the property, and that, in so far as they undertake to reduce the sale price fixed in the cessions to the loss and injury of appellants, they are confiscatory and repugnant to the Fifth Amendment to the Federal Constitution, and are therefore void. It is then alleged that appellee Spry, acting as Commissioner of the General Land Office, has disposed of a large part of said lands under said unconstitutional enactments and has not even required the payment of $1.25 per acre for the lands disposed of as provided in said acts, but has patented them without any consideration being paid therefor, and that he will, unless restrained by order of the Court from so doing, dispose of the remaining lands, aggregating many thousands of acres, without any consideration therefor, to the great and irreparable loss of appellants.

These allegations stand admitted. Those portions of the Acts of 1902 and 1908 which purport to authorize the disposition of the land under the homestead laws at $1.25 per

acre, instead of at their true market value as provided in the agreements, and which true market value is alleged in the bill to be from $5 to $250 per acre, are plainly confiscatory of the property rights of appellants. That appellants would sustain heavy loss if the remaining lands should be disposed of under the provisions contained in said Acts of 1902 and 1908, herein assailed, was not questioned by the courts below. As the rulings of the courts below denying relief under this paragraph of the bill are identical with their rulings under the ninth paragraph of the bill, next to be considered, they will be hereinafter considered under that paragraph. Attention is here invited to the specific allegation in this paragraph of the bill that the two provisions contained in the Acts of 1902 and 1908, the constitutionality of which is herein assailed but which were held by the courts below to be valid, authorize appellee Spry to dispose of the land only under the homestead laws, and require the payment of the purchase price of $1.25 per acre before the issuance of patents, and that in disregard of said provisions a large part of the land had theretofore been patented without any consideration being paid therefor, and that, unless restrained by proper order, appellees would continue to dispose of the remaining lands, aggregating many thousands of acres, without any consideration being paid therefor, to the great and irreparable loss of appellants. Here there is a specific charge that appellees are acting wholly outside of their lawful authority, and this charge stands admitted. As appellees can act and speak in their official capacity only by authority of law (Poindexter *v.* Greenhow, 144 U. S., 270), the threatened acts herein complained of would be the mere acts of individuals committed under color

of their official offices, but wholly outside of the scope of their official authority, and clearly appellants have such an interest in the proceeds to be received from the disposition of the property as entitles them to relief against such threatened unauthorized acts, which would, if committed, further despoil the estate and thereby prevent them from receiving any consideration from this property. This portion of the allegation contained in the eighth paragraph of the bill brings it within the previous classification under the heading "(*a*) Threatened acts of appellees for which there is no authority of law," and under the authorities therein cited appellants are entitled to injunctive relief under prayer "m" (R., 35) of the bill.

PARAGRAPH NINE (R., 21-22).—The allegations of paragraph nine are substantially the same as those contained in paragraph eight, except that they relate to the lands included within the Minnesota National Forest Reserve. It is alleged in the bill that under the agreements the lands embraced in the eighth and ninth paragraphs were to be disposed of at public auction at the highest price obtainable; that the lands are reasonably worth in the open market from $5 to $250 per acre, and if exposed to sale at public auction would bring said prices; that by the Acts of 1902 and 1908 appellees were authorized to dispose of a part of the lands under the homestead laws at the arbitrary price of $1.25 per acre, and that the Act of 1908 directed that the remaining lands should be included in the Minnesota National Forest Reserve and paid for by the United States at the arbitrary price of $1.25 per acre. Thus on the face of the record those portions of said acts which undertake to

dispose of the lands at $1.25 per acre are plainly confiscatory. The courts below, particularly the Court of Appeals, held (R., 43) that the agreements did not constitute a contract between the Indians and the Government whereby the former acquired a vested right in the method of handling the trust property, and (R., 42) that, under the decision of this Court in Naganab *v.* Hitchcock, 202 U. S., 473, these two paragraphs of the bill presented in effect a suit against the United States, which could not be maintained without its consent. This ruling is assigned as error. Assignments 1, 2, 3, 6, 7, 8, 11, and 20. There is no similarity between the question presented in paragraphs eight and nine of the bill in this case and the question presented for decision in the Naganab case. In the Naganab case the bill treated the property in suit as *tribal* property (202 U. S., 473-4) and assailed the constitutionality only of that portion of the Act of June 27, 1902, changing the manner of disposing of the timber on the lands classified as "pine lands," the agreements providing for the sale of the timber standing, whereas the Act of 1902 directed the cutting of the timber and its sale on bank scale. It was alleged in that bill that this change would reduce the salable value of the pine timber more than $1,000,000, which allegation was on its face without substance, and when considered in the light of the official reports portraying the great timber frauds theretofore perpetrated in the cruising, valuation, and sale of the standing timber theretofore disposed of, referred to in paragraph 8 of the present bill (R., 20), was utterly devoid of merit. The relief asked was (202 U. S., at 475) that the Secretary be enjoined from disposing of the timber under the Act of

June 27, 1902; that he be required to dispose of it as directed by the Act of January 14, 1889; that he be *required to account to the complainants for the disposition of the timber under the Act of January 14, 1889*, and for general relief. In that case the validity of the provision of the Act of 1902 relating to the disposition of the *timber* was alone presented for consideration, there being no question raised in that suit as to the disposition of the *land*. The provision in the Act of 1902 changing the method of disposing of the timber, was designed to prevent a continuation of the timber frauds theretofore perpetrated, and was distinctively in the interests of the Indians and for their benefit. Its enactment was within the power of the trustee, particularly as the continuation of the frauds created increasing liability on the part of the trustee—the United States. Accordingly the Court of Appeals held in that case (25 App. D. C., at 206-7) that there was no taking of property. To have required the Secretary, as prayed in the bill, to have continued the disposition of the timber as provided for in the agreements of 1889 would have subjected the trustee—the United States—to a claim for the value of the timber fraudulently being disposed of, and no decree in such a case could have properly been passed without the United States being made a party to the suit. As the United States could only be made a party to that suit with its consent, the Court was plainly without jurisdiction, and such is the substance of the decision of this Court in that case. This Court, after setting out the substance of the bill and its prayers (202 U. S., at 475), found it unnecessary to determine the questions presented in the present case, this Court saying:

> "Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political, and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is no jurisdiction to entertain this case."

The bill in the Naganab case having treated the property as *tribal,* this Court held (at p. 476) that the case was on all fours with Oregon *v.* Hitchcock (202 U. S., 59), which involved *tribal* property. In the Oregon case the State brought a suit against Hitchcock to require him to patent to the State under the Act of March 12, 1860, certain lands within the limits of the Klamath reservation. The Indian title to the land had never been extinguished. The land was not within the provisions of the swamp land donation act of 1860. There had been no finding or adjudication by the Land Department that the lands were swamp or overflowed on March 12, 1860. To have required the Secretary to have issued the patents would have subjected the United States to liability to the Indians, as well as to have required him to make an unauthorized disposition of the land to the loss and injury of the United States. Accordingly this Court held that suit could not be maintained, as the United States was a necessary party, had never given its consent to be sued, and had never consented to assume full responsibility for the result of the suit affecting the rights of its wards, the Indians. The underlying question in both suits was identical. No relief could be afforded in either case without impairing the rights of the United States or subjecting it to liability.

Far different was the Naganab case from the case at bar.

In that case the Court was dealing with tribal property under the allegations of the bill, while in the present case it is called upon to determine the rights of individuals in and to property held by the United States as naked trustee under an executed trust, and in and to which all vestige of band or tribal title as well as all property rights of the United States have been completely extinguished. All that is asked is to restrain appellees from the commission of threatened acts under color of unconstitutional enactments that would prove destructive of the estate and so reduce the property rights of appellants therein as to render them negligible.

PARAGRAPHS 10-B AND 10-C (R., 24, 25).—These two paragraphs of the bill present questions of law so closely related that they will be considered together. It is alleged that by the agreements of 1889 all the different bands or tribes of Indians in Minnesota ceded to the United States, on the specific terms hereinbefore stated, all of the lands on the Red Lake Reservation except sufficient lands to allot the then 1,168 members of the Red Lake Band; that the commissioners appointed under the Act of 1889 reserved approximately 700,000 acres, stating in their report that this was done because much of the lands were untillable, and to enable the 1,168 Indians to select suitable lands for allotment purposes, and that the reserved area could not be reduced until after the survey and allotments had been made (R., 22). [Paragraph 10-A of the bill (R., 22-24) alleges the refusal of the administrative officers for thirty-three years to perform the ministerial duty of permitting the Red Lake Indians to take their allotments.] It is then alleged

that by the Act of February 20, 1904 (33 Stat., 48), it was declared that the Indians belonging on the Red Lake Reservation should retain the diminished reservation independent of all other bands of the Chippewa Tribe of Indians, and further expressly declared that nothing in that act should deprive the Indians belonging on the Red Lake Reservation of any benefits to which they were entitled under the agreements of 1889, which declaration undertook to preserve the rights of the Indians belonging on the former Red Lake Reservation in and to all the proceeds received and to be received from all the property ceded under the agreements by all the former bands or tribes, and to divest all the members of the other former bands or tribes of any interest in the 700,000 acres so reserved, or so much thereof as was not needed to make allotments of 80 acres each to the 1,168 members of the former Red Lake Band. It is alleged that so much of this land as was not required to make the allotments passed to the United States under the terms of the cessions burdened with, and subject to, all the conditions enumerated in the cessions, and that it was not within the power of Congress to divest appellants of their interest in the property without adequate or even any consideration therefor. It is alleged that the Act of 1904 undertakes to confiscate the property of appellants, and that it is unconstitutional and void. It is then alleged that appellees Work and Burke are proceeding to administer the property under said unconstitutional enactment, and that they will continue to do so, to the great and irreparable loss and injury of appellants, unless enjoined and restrained from so doing. It is then alleged that by the Act approved May 18, 1916 (39 Stat., at 137), Congress authorized the creation of a forest reserve, known as

the Red Lake Indian Forest, out of a part of the said 700,000 acres; that there has been included in said forest reserve about 250,000 acres of the heavily timbered lands, which were not subject to allotment under the agreements of 1889 and which were included within the terms of the cessions; that said forest reserve was created without limitation as to duration, and was designed and intended to be perpetual; that it was not created for the benefit of the Indians nor for the purpose of effectuating any provision contained in the agreements of 1889; that there is no provision in the Act of 1916 for any compensation for the lands within the forest reserve; that the proceeds being received from the disposition of the timber are, under the provisions of said Act, being diverted from the fund created under the agreements of 1889 and placed in a new fund standing to the credit of the "Red Lake Indians," and which new fund bears interest at the rate of 4 per cent per annum, whereas by the agreements the proceeds were to be deposited in the principal trust fund to the credit of "all the Chippewa Indians in Minnesota" and were to bear interest at the rate of 5 per cent per annum, and that the interest annually accruing on this fund, as well as the principal, are being used and expended for the exclusive use of the members of the former Red Lake Band. It is then alleged that the power of Congress over said trust property was limited to the execution of the trust in conformity with its plain provisions; that said Act of 1916, in so far as it undertakes to create said forest reserve in perpetuity without compensation for the property embraced within its limits, and in so far as it attempts to divert the proceeds received from the sale of the

timber from said forest reserve from the 5 per cent interest-bearing fund standing to the credit of "all the Chippewa Indians in the State of Minniesota" to the 4 per cent interest-bearing fund placed to the credit of the "Red Lake Indians," was and is in violation of the trust hereinbefore described, is confiscatory of the rights of appellants, is in excess of the power of Congress, and is unconstitutional and void. It is further alleged that unless appellees Work and Burke are restrained from so doing they will continue to deposit the proceeds received from the sale of the timber in the fund standing to the credit of the "Red Lake Indians" and will continue to use the fund and interest accruing thereon for the exclusive use of the members of the former band of Red Lake Indians. The allegations of the bill are plain, that by the Acts of 1904 and 1916 Congress mistakably attempted to deal with this property as the absolute property of the United States and the members of the former band of Red Lake Indians and thereby mistakenly attempted to confiscate the rights of all of appellants, not members of the former Red Lake Band, in and to all of the 700,000 acres and to confer the exclusive ownership thereof upon the 1,168 members of that former band, and at the same time to preserve the rights of the 1,168 members of the former Red Lake Band in and to all of the property ceded under the agreements by all the other former bands and tribes. It is evident that this legislation was enacted by Congress under a misapprehension of the true relation of the Government to the lands, and that the two Acts are plainly confiscatory of the rights of appellants.

It was held by the Court below (R., 42) that these two

paragraphs of the bill could not be maintained because appellant Morrison was not a member of the Red Lake Band, and has shown no authority to speak for them, and that the Red Lake Indians were necessary parties. This ruling is assigned as error (R., 45, 46, assignments 4, 13, 14). The agreements of 1889 extinguished the Red Lake Band and its members were merged in the designated class. Their property rights, theretofore *tribal*, were by the agreements individualized. Appellant Morrison is a member of the designated class of persons, which includes the members of the former Red Lake Band, for whose exclusive benefit all of the former bands or tribes ceded all their band or tribal right, title, and interest in and to all the property. He is asking only protection against diversion of a large part of the trust estate to the irreparable loss and injury of the great body of the *cestuis que trustent*. His right to the relief asked is based upon absolute want of power in Congress to have validly enacted the Acts of 1904 and 1916 and want of power in appellees to carry said unconstitutional Acts into effect. The Red Lake Indians, therefore, are not necessary parties to this suit. Cherokee Nation *v.* Hitchcock (187 U. S., 294, at 300). It was manifestly impossible to make each member of the former Red Lake Band party defendant. The property is in the hands, or under the control of, appellees Burke and Work. It has not reached the hands of the members of the former Red Lake Band. Appellees Burke and Work are the administrative officers named in the agreements, as well as in the Acts of 1904 and 1916, to administer them. Absolute want of power in appellees Burke and Work to carry into execution the Acts of 1904 and 1916, by reason of their invalidity, being the basis

of these two paragraphs, the members of the former Red Lake Band were not necessary parties.

PARAGRAPH 11-B (R., 28-29).—It is alleged in this paragraph that definite provision was made in the agreements for the education of the children embraced in said designated class, and that no authority was conferred upon Congress to appropriate or use any part of the proceeds received from the disposition of the trust estate in aiding the public school system of the State of Minnesota; that the public schools of the State, which the Indian children are attending, are a part of the free public school system of that State; that under the laws of the State every Indian child residing in a public school district is entitled to admission to the public school without any tuition charge whatsoever, and that the parents of every such child are required by positive law, under heavy penalty, to see that their children of school age regularly attend the public schools; that by an Act of Congress approved May 24, 1922, the Secretary of the Interior was authorized to withdraw from the trust fund the sum of $46,570 and to expend the same for payment of tuition of Indians children enrolled in the public schools of the State. It is alleged that this appropriation is a pure gratuity out of the trust funds to the public schools of the State and in violation of the plain terms of the trust; that its expenditure confers no additional benefits or advantage whatsoever on any Indian child; that there is no authority under State law for any officer of any school district to enter into a contract for the payment of tuition for Indian children residing in school districts and attending the public schools, and no authority for the receipt by any officer of any money under any such contract; that said act authorizing the appropriation is in violation of the express

terms of the trust, is in violation of the Fifth Amendment to the Federal Constitution, and is unconstitutional, null, and void, but that the Secretary of the Interior will, unless restrained and enjoined by order of the Court, proceed under said unconstitutional enactment to withdraw said amount from said trust fund and use the same for said unlawful purpose, to the great and irreparable loss and injury of appellants. The Court of Appeals held (R., 42) that the officials of the public schools of the State were necessary parties. This is assigned as error (R., 45, 47, assignments 5, 16). As this paragraph of the bill is based upon absolute want of power in Congress to appropriate the trust fund for said purpose and want of power in the Secretary to enter into the contracts and expend the money for purely gratuitous purposes, the officials of the public schools of the State were not necessary parties under the authorities hereinbefore cited.

It may be contended that the money appropriated in said Act has, since the filing of the bill, been expended, and that therefore this paragraph presents a moot question. The unexpended balance of the appropriation during the fiscal year was reappropriated for future similar use, and in addition thereto similar appropriations to be used for the identical purpose are annually being made. Before a suit can be filed presenting the same question under any subsequent enactment and brought to this Court for decision the money could be expended, and thus final decision forever forestalled. The importance of a final decision upon the question here presented therefore becomes at once apparent.

The allegations of this paragraph are fully sustained by reference to the statutes of Minnesota. Section 2895, G. S.,

1913, as amended by Section 16, chapter 497, Laws 1921, requires the equal distribution of the State school funds among the school districts in exact proportion to the number of children attending said schools. Section 2670, G. S., 1913, as amended by chapter 61, Laws 1921, provides:

> "All schools supported in whole or in part by State school funds shall be styled public schools and admission to and tuition therein shall be free to all persons between the ages of five and twenty-one years, in the district in which such pupil resides."

Section 2979, G. S., 1913, a mended by chapter 320, Laws of 1919, requires the attendance of all children in either public or private schools during the school term each year. Section 2982, G. S., 1913, provides that any person who refuses or fails to keep in school any child of whom he has legal charge or control shall be guilty of a misdemeanor. Section 2900, G. S., 1913, subjects any member of any school board of any district to civil suit who may vote for, or being present shall fail to vote against, the exclusion, expulsion, or suspension from school privileges of any child on account of race, color, nationality, or social position. Section 2901, G. S., 1913, prohibits any school district from classifying its pupils with reference to race, color, social position, or nationality, as well as separating its pupils into different schools or departments upon any of such grounds. Section 7, chapter 497, Laws 1921, provides assistance to the County Board of Education for unorganized territory in any county in providing transportation or board for such children of school age as reside beyond reasonable walking distance from the nearest public school. The only provision contained in

the State laws under which any school district could receive money from the Secretary of the Interior is found in Section 2952, G. S., 1913, which provides that the school board of any independent school district may "receive, for the benefit of the district, *bequests, donations, or gifts* for any proper purpose and apply the same to the purposes designated."

It is, therefore, plain from an examination of the State laws that the payment of tuition to State school districts for Indian children out of the trust funds confers upon the children no benefits and is a gift or gratuity, and that Congress cannot lawfully appropriate, nor can the Secretary lawfully expend, the trust funds for purely gratuitous purposes.

PARAGRAPHS 12-*a* and 12-*b* (R., 29, 30, 31.)—These two paragraphs of the bill present the same question for decision and will be here considered together. It is therein alleged that, pursuant to a governmental policy then long established, the United States, in 1889, and for many years theretofore, maintained and had maintained agencies among the Chippewa Indians in Minnesota which were a part of its Indian Bureau, and had always defrayed the expenses of said agencies out of the public funds of the United States; that by Section 7 of the agreements the particular expenses to be paid out of the proceeds received from the sale of the ceded property were expressly enumerated, and that no provision is found therein authorizing the payment of any agency expenses of the United States at any time out of the trust funds; that it was understood by the Indians and the officers and agents of the United States who negotiated and signed said agreements for the United States that all agency

expenses were thereafter to be defrayed by the United States; that pursuant to said understanding for more than 20 years after said agreements became effective the United States defrayed all of the expenses of its agencies maintained in Minnesota, pursuant to its long-established governmental policy, out of its public moneys; that said policy continued down to about the year 1911, when Congress commenced using Indian funds under its control in the payment of the regular agency expenses of the Indian Bureau; that thereafter and until the year 1921 the Secretary of the Interior was, under this new and changed policy and in violation of said agreement, annually authorized, by provisions contained in Acts of Congress, to withdraw from the principal trust fund of the Chippewa Indians large sums of money and to use the same for the purpose of promoting civilization and self-support among said Indians, which said sums were withdrawn and used principally in defraying the expenses of the agencies of the Indian Bureau maintained in Minnesota; that by an Act approved March 3, 1921, the Secretary of the Interior was authorized, in his discretion, to withdraw the sum of $45,000 from the principal trust fund and to use the same in defraying the expenses of the agencies maintained in Minnesota, and by the Act of May 24, 1922, to withdraw the sum of $42,500 and to use the money for the same purpose; that the use of said money for said purpose is in violation of the terms of the trust and the understanding of all the contracting parties when the agreements were entered into, and that said terms and understanding continue to control the use of said money notwithstanding the changed governmental policy inaugurated in 1911; that said agencies are not maintained for either the support or

civilization of appellants, but solely pursuant to said governmental policy, and that Congress had no lawful authority to appropriate said sums out of said trust funds in violation of the express terms of the trust and to authorize the use of said money in defraying the expenses of the United States agencies maintained in Minesota; that said Acts authorizing said appropriations are in disregard of the express terms of said trust and in violation of the Fifth Amendment to the Federal Constitution, in that they constitute the taking of appellants' property without compensation and are unconstitutional, null, and void. It is then alleged that the Secretary will, unless restrained by order of the Court from so doing, withdraw said money and use it for said purpose.

Absolute want of power in Congress to appropriate the money for the alleged purpose is the basis of these two paragraphs.

The Court of Appeals (R., 42, 43) held the Acts to be valid, citing as authority therefor Lane *v.* Morrison, 246 U. S., 214. This ruling is assigned as error (R., 47, assignments 17, 18.) The sole question presented by the bill in that case was whether the language used in the joint resolution appropriated the money. There was no question as to the power of Congress to make the appropriation or the authority of the Secretary to expend the same. The Court of Appeals (45 App. D. C., 79) considered the nature of the trust from which the money was to be paid in connection with the allegations of the bill, and held the money was not appropriated. This Court (245 U. S., 214, at 218) states the only question it decided, viz:

> "The only point presented for decision is whether by the language used, Congress has sufficiently indi-

> cated an intent to appropriate the money in question. THE BILL DOES NOT CHALLENGE ITS POWER."

The nature of the trust, the power of Congress to appropriate the money, and the purpose for which it is to be used are squarely presented in the case at bar.

The allegation that when the agreements were entered into in 1889 there was a definite understanding that thereafter the expenses of maintaining the agencies were to be defrayed by the United States, and that this understanding was adhered to by the United States for 21 years thereafter, is admitted by the pleadings. No provision can be found in the agreements, nor in the Act of 1889 that in anywise conflicts with said understanding. A change in governmental policy 21 years after the agreements were executed and "took effect" could not abrogate the plain terms upon which the trust was created. It may be contended by counsel for appellees that the proviso to section 7 of the Act of 1889 is at variance with the claimed understanding of the parties when the agreements were signed, but an examination of said proviso in the light of its interpretation to the Indians will disclose that there is no basis for such contention. The proviso is as follows:

> "*Provided,* That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof."

When the agreements were submitted to the Indians inquiry was made of the Commissioners as to the meaning of the

proviso, and the Indians were told, as shown by the record of the negotiations (H. R. Ex. Doc. No. 247, 51st Cong., 1st ses., at pp. 88, 164), that it meant:

> "In case of the failure of crops or any unforeseen misfortune here is a storehouse of money to be drawn upon for your wants."

The interpretation given the Indians by the Commissioners squared with the then recognized meaning of the words "support and civilization." These words had been frequently used in treaties and agreements with the Indians for more than a century. They had a well-defined meaning acquired by continuous usage. Not a dollar appropriated by Congress for "support and civilization" in fulfillment of treaty stipulations had ever theretofore been used in defraying any part of the expenses of a United States agency. Every dollar theretofore appropriated for "support and civilization" of Indians had either been paid to the Indians in cash, used in the purchase of food and clothing, and other articles necessary to their material wants, or in providing blacksmiths, agricultural implements, and other like agencies for their civilization and advancement. Such being the universally recognized meaning of the words "support and civilization" as used in Indian treaties and agreements at all times prior to and when the agreements were entered into in 1889, the Commissioners having assured the Indians that such was their meaning, and the Indians having accepted and relied upon said assurance, the United States and its officers are bound thereby. It is immaterial that said words, later appearing in Indian legislation, have received a more enlarged meaning. The agree-

ments were entered into by a superior dealing with an inferior people, and the obvious meaning of said words as understood by the Indians, and as construed to them by the Commissioners, must control (Minnesota *v.* Hitchcock, 185 U. S., at 395, 396, and cases therein cited).

Again, Congress under the proviso was authorized to appropriate from the trust funds "from time to time," thus clearly indicating that the authority conferred was to be exercised only as the necessities of the Indians required. The agencies were continuing institutions requiring annual appropriations for their support, and had it been the intention of either of the contracting parties that the expenses of these agencies were to be paid out of the trust funds other and different language would have been employed. Continuous annual appropriations of 5 per cent of the trust fund for agencies' purposes during the trust period of fifty years would so reduce the annual interest payments to the Indians and the school fund to be annually provided as to render them negligible, and would so deplete the fund that at the expiration of the fifty-year period there would be practically nothing to divide among the Indians. The construction insisted upon by appellants permits the realization of the beneficent objects and purposes of the trust plainly intended by the settlers, while any other construction would be destructive of every provision designed and intended for the material aid and advancement of the Indians.

THIRTEENTH PARAGRAPH (R., 31-32).—It is alleged in this paragraph of the bill that the Government had maintained an agency at the village of White Earth, on the White Earth Reservation, for more than 50 years, at which point

there are suitable buildings for all agency purposes, constructed out of Indian and public funds, and which can be used without cost; that of the 12,000 members of the former bands or tribes of Chippewa Indians in Minnesota, more than 7,000 were allotted on the White Earth Reservation, the records pertaining to their allotments being kept at the agency; that because of complaints made by Indians allotted on the White Earth Reservation against the administration of the Indian Bureau, appellee Burke caused an order to be issued for the removal of the agency to Cass Lake, Minnesota, which is situated about 70 miles by direct line from the White Earth Reservation and about 130 miles by railroad, with no direct connections; that Cass Lake is located within the ceded territory, comparatively few Indians residing within the vicinity of that town; that at Cass Lake there are no public buildings for either the agency or its employees; that it is proposed to house the agency in rented quarters in which vaults are to be installed and other improvements made, necessitating the expenditure of approximately $25,000; that it will be necessary to maintain caretakers at White Earth to look after the agency buildings and other property if abandoned; that the Commissioner intends to, and will, unless restrained by order of the Court, use approximately $25,000 of the trust fund, belonging to appellants, in improving the rented quarters at Cass Lake, and will thereafter use their funds in the payment of rent therefor; that the use of the money for such purposes is in violation of the trust under which the principal fund was created and is without authority of law. No answer was filed, and the allegations of this paragraph of the bill stand admitted. The relief asked (R., 35, prayer I.) is that ap-

pellee Burke, Commissioner of Indian Affairs, and appellee Work, Secretary of the Interior, be enjoined and restrained from expending any of the trust funds in defraying the expenses of the removal of the agency or for the maintenance of said agency at Cass Lake, or for the rental or alteration of any building at Cass Lake for agency purposes. The Court of Appeals (R., 43) held that there was authority for the removal of the agency and inferentially held that the use of the trust funds for said purposes was proper. This is assigned as error (R., 48, assignment 19). Conceding that the order was validly issued, the bill alleges that there is no authority of law to use a dollar of the trust funds in defraying the expenses of removal, or in paying the expenses for remodeling the rented quarters, or the rent for said quarters. If claimed authority existed, it was incumbent upon appellees to present same by answer, which was not done. Utter lack of power in appellees, to use the trust funds for the purposes named, is the basis for the relief asked under this paragraph, and, as no authority appears from the record, it is clear that appellees have and are acting without legal authority, and that appellants are entitled to the relief asked.

3. Inability to Afford Relief under Any One Paragraph of the Bill Does Not Preclude Relief Being Afforded under Any Other Paragraph.

If it should be found that relief could not be afforded appellants under any particular paragraph of the bill, by reason of absence of necessary parties, or for other cause, such finding would not prevent appropriate relief being granted

under any other paragraph of the bill. Waterman *v.* Canal Louisiana Band and Tr. Co. (215 U. S., 33, at 47, 48, 49).

4. Entire Estate is Being Systematically Mischievously Destroyed by Appellees.

The bill, taken in its entirety, presents a case wherein appellees and their predecessors in office have systematically and mischievously disregarded the plain terms of the trust hereinbefore described and have thereby worked a destruction of a large part of the entire estate, to the great loss and injury of the entire designated class of beneficiaries. The destruction of the estate has been systematic, mischievous, and continuous, and if permitted to continue the entire designated class will be deprived of any substantial benefits from the entire estate. Under such circumstances appellants had a right to invoke the interposition of a court of equity in order that an adequate remedy might be afforded them against further despoliation of their property rights. United States *v.* Osage County, 251 U. S., 128, at 134.

Conclusion.

For the above reasons it is respectfully submitted that the decree of the Court below should be reversed and the cause remanded with appropriate instructions.

Respectfully submitted,

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